

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-MOT-REV-2023/00371

In the matter between:

**KARIN ROSEMUND**

**1<sup>st</sup> APPLICANT**

**JOHANNA PETRONELLA ROSEMUND**

**2<sup>nd</sup> APPLICANT**

and

**JOANEL VAN LILL**

**1<sup>st</sup> RESPONDENT**

**JOHANNES FRANCOIS ROSEMUND**

**2<sup>nd</sup> RESPONDENT**

**POLOGO (PTY) LTD**

**3<sup>rd</sup> RESPONDENT**

**REGISTRAR OF THE BUSINESS AND INTELLECTUAL  
PROPERTY AUTHORITY OF NAMIBIA**

**4<sup>th</sup> RESPONDENT**

**BUSINESS AND INTELLECTUAL PROPERTY**

**AUTHORITY OF NAMIBIA (BIPA)**

**5<sup>th</sup> RESPONDENT**

**Neutral citation:** *Rosemund v Van Lill* (HC-MD-CIV-MOT-REV-2023/00371)  
[2023] NAHCMD 633 (6 October 2023)

**Coram:** USIKU J

**Heard:** 15 September 2023

**Delivered:** 6 October 2023

**Flynote:** Applications and motions – Urgent application – Requirements of urgent application – As a general rule, illegality on the part of the respondents is not a ground for urgency – Exceptional circumstances need to be shown before urgent relief is granted.

**Summary:** The applicants brought an urgent application seeking to interdict the first and second respondents from holding a shareholders' meeting of the third respondent, together with certain ancillary relief, pending the hearing and finalisation of Part B of this application. The respondents deny that the applicants have satisfied the requirements for the matter to be heard as one of urgency.

*Held that* the applicants have not satisfied the requirements of urgency and their application is struck from the roll for lack of urgency.

---

### ORDER

---

1. The applicants' application to have the matter heard as one of urgency, is hereby refused and the matter is struck from the roll for lack of urgency.
  2. The applicants are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the first, second and third respondents. Such costs to include the costs of one instructing and one instructed counsel.
- 

### JUDGMENT

---

USIKU J:

#### Introduction

[1] This is an urgent application brought by the applicants, seeking an order interdicting the first and second respondents from performing certain actions, pending the finalisation of a review application contained in Part B of the application.

[2] The application consists of two parts, namely Part A and Part B. Part A is the urgent part, in which the applicants seek an interim relief, pending the finalisation of Part B. In Part B, the applicants seek an order:

(a) reviewing and setting aside a resolution of the General Meeting of the Members of the third respondent dated 3 October 2022, appointing the first and second respondents as directors of the third respondent;

(b) reviewing and setting aside a resolution of the General Meeting of the Members of the third respondent dated 25 November 2022, removing the first applicant as a director of the third respondent;

(c) correcting a CM29 form dated 30 November 2022, filed at the fifth respondent, in such a way that the first and second respondents are removed as directors of the third respondent and the first applicant is re-appointed as a director of the third respondent, plus other ancillary relief.

[3] Part B is to be prosecuted in the normal course.

[4] Under Part A, the applicants seek an order in the following terms:

'1 That the applicants' non-compliance with the forms and service provided for by the Rules of this Honourable Court is condoned and that the matter is heard as one of urgency as contemplated by rule 73(3).

2 That a rule nisi be issued calling upon the respondents to show cause, if any, on a date and time determined by this Honourable Court, why an order in the following terms should not be made final:

2.1 Interdicting the shareholders meeting scheduled for 24 August 2023;

2.2 The first and second respondents be interdicted from holding general and directors/shareholders meetings for the third respondent pending the final adjudication of the relief set out in Part B hereof in the ordinary course; and

2.3 Interdicting and restraining the first and second respondents from making direct or indirect contact with the second applicant with the aim to force her to sign documentation to remove her as director of the third respondent, pending the final adjudication of the relief set out in Part B hereof in the ordinary course.

2.4 Interdicting the first respondent from acting as a shareholder in the third respondent without having any shares.

2.5 Ordering that the respondents do all things necessary to give effect to paragraphs 2.1 to 2.3 hereof as an interim arrangements pending the final adjudication of the relief set out in Part B hereof in the ordinary course.

2.6 Directing that those respondents who oppose this application shall pay the costs of this application jointly and severally, the one paying the other to be absolved.

2.7 Granting the second applicant such further or alternative relief as this Honourable Court may deem meet.

3. Directing that the orders sought in prayers 2.1 to 2.4 shall operate as an interim order and interdict with immediate effect pending the confirmation or discharge of the rule nisi sought.

4. Granting the applicants such further or alternative relief as this Honourable Court may deem fit.'

[5] The application is opposed by the first, second and third respondents ('the respondents').

### Background

[6] This application involves a dispute between family members. The second applicant is the mother of the first applicant, the second respondent and one deceased son. The three children, either in their own names or through trust(s), each hold one third of the shares in the third respondent.

[7] At a meeting purporting to be a general meeting of shareholders held on 3 October 2022, the first and second respondents were appointed as directors of the third respondent. Further, at a meeting purporting to be a meeting of shareholders held on 25 November 2022, the first applicant was removed as a director of the third respondent. The second applicant remains a director of the third respondent.

[8] The applicants challenge the legality of the purported shareholders' meeting and the validity of the resolutions taken thereat.

[9] On 24 July 2023, the first and second respondents issued out a notice calling for a meeting of shareholders of the third respondent to be held on 24 August 2023.

The express purpose of the aforesaid meeting is for the members to vote on and pass a resolution removing the second applicant as a director of the third respondent, with effect from 31 August 2023.

[10] On 18 August 2023, the applicants brought the present application on an urgent basis. The application was set down to be heard on 23 August 2023, however, on 23 August 2023, the respondents had not filed their answering papers, and the parties indicated that the respondents have agreed to cancel the shareholders' meeting scheduled for 24 August 2023. In a joint status report filed on 28 August 2023, the parties reported that the respondents have agreed not to convene further meetings of the third respondent pending the final adjudication of Part A of the present application.

[11] The court granted the respondents opportunity to file their answering affidavits. The parties, however, did not file their papers within the time-frames prescribed by the court. In their aforesaid joint status report, the parties proposed certain dates within which they committed themselves to exchange the relevant papers.

[12] It turned out that the respondents filed their answering affidavit on the date proposed in the joint status report, but at 16:00 instead of 15:00. The respondents have filed a condonation application in respect of the late filing thereof. The condonation application is opposed by the applicants.

[13] For the reasons that the court did not prescribe the dates which the parties proposed in their aforesaid joint status report, the court is not going to deal with the merits of the condonation application nor with the respondents' grounds of opposition. The condonation is sought in respect to a non-compliance with dates that were not sanctioned by a court order, but dates agreed between the parties themselves. The court does not take issue that the parties' proposed dates within which to file outstanding papers. The court shall, therefore, proceed on the basis that the parties exchanged the outstanding papers and that same were duly filed.

[14] The application was heard by this court on 15 September 2023.

[15] At the hearing of the application, counsel for the applicants, Mr Ellis, argues that the issue of urgency is no longer a live issue because the respondents have conceded to that, on 23 August 2023, and that was the reason the hearing did not take place on that date. Counsel, therefore, argues that the hearing of the application is presently confined only to Part B of the application.

[16] Mr Jacobs, counsel for the respondents, submits that urgency is a live issue and that the present proceedings are confined only to Part A of the application. He avers that there are various issues raised under Part A of the application and the respondents only agreed not to hold further meetings of the third respondent pending the finalisation of Part A of the application.

[17] On the issue of whether the hearing of the application on 15 September 2023 is on urgent basis or not, I am of the view that the court is currently seized with an urgent application as contained in Part A of the application. Firstly it is apparent from the parties' joint status report filed on 28 August 2023 that the respondents agreed only to not hold further meetings of the third respondent pending the adjudication of Part A of the application. This fact shows that the parties were aware as on 28 August 2023 that Part A of the application was not finally adjudicated.

[18] Secondly, Part A consists of other reliefs apart from the relief concerning the meeting which was scheduled for 24 August 2023 as more fully set under paras 2.2, 2.3 and 2.4 of the notice of motion. In terms of the notice of motion, those reliefs are sought independently of the relief set out in para 2.1, pending the final adjudication of Part B of the application.

[19] Thirdly, Part B is not ripe for adjudication, as some of the requirements of rule 76, such as the filing of the complete record sought to be reviewed and set aside, have not yet been complied with. Furthermore, at this stage, the parties have not even filed a joint case management report.

[20] For the foregoing reasons, I am of the view that urgency is a live issue in the present proceedings and must therefore, be dealt with.

Urgency

[21] In the founding affidavit deposed to by the first applicant, the applicants deal with the issue of urgency as follows:

'Urgency

82 The first and second respondents have a complete disregard to the rule of law and specifically the Company Act, as their conduct is greatly prejudicing the applicants as well as the third respondent. It goes without saying that their conduct is illegal.

83. The first and second respondent intends to unlawfully remove the second applicant as a director of the third respondent on 24 August 2023.

84. If the second applicant is also unlawfully removed on the 24 August 2023, then the first and second respondent will continue with the unlawful activities, which will be prejudicial not only to myself and the second applicant but to the third respondent and its creditors.

85. Despite my legal representatives based attempts to have the matter amicably resolved, the respondents refuse to comply with the law and their attorneys fail to properly advise them and on 11 August 2023 the attorneys for the first and second respondents made it clear that the meeting will proceed if not for the urgent application.

86 I am informed and submit to the honourable court that if the second applicant is not afforded the interim interdict which stops the meeting from proceedings she will be unlawfully removed as a director and the harm to follow is fully discusses below.

(a) I am also advised that if I do not approach the honourable court by means for interim relief on an urgent basis, the application for interim relief will be heard in the normal course, normal course however would be after the proverbial horse had bolted and the relief would have become moot as the second applicant would have been removed.

87. The factual basis of the events also provide great prospects of success for the relief sought in Part B of the Notice of Motion and accordingly without the relief in Part A being granted on an urgent basis, the relief in Part B might become impossible, as the third respondent might by then be dissolved with the first and second respondents having taken all the money from the third respondent for their own benefit.

88. I am advised that the second applicant is in a precarious legal position until such time as I am afforded relief by the honourable court to reverse the decision of 3 October 2022. The first and second respondent could remove the second applicant as director of the third respondent on 24 August 2023, which will necessitate a further application to reverse that the decision as well. Such a further application however would be subject to further harm having followed and no substantial redress at that time anymore, it is for all intents and purposes "now or never".

89. I was not afforded an opportunity to be heard prior to making a decision to remove me as director of the third respondent and they intend to do the same with the second

applicant, the honourable court should be inclined to hear the application on an urgent basis for relief to avoid a miscarriage of justice which can be prevented.

(a) I am advised that the court will never turn a blind eye to injustice and allow it to happen and be repaired in retrospect when it is so clearly placed in a position to prevent such injustice proactively, as in this case.'

[22] The respondents deny that the applicants have met the requirements for urgency. They contend that the trigger for the alleged urgency is the appointment of the first and second respondents as directors of the third respondent, which appointments occurred almost a year ago and have been throughout known by the first applicant.

### Analysis

[23] Rule 73(4) makes provision for urgent applications. It provides as follows:

'(4) In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –

- (a) the circumstances which he or she avers render the matter urgent; and
- (b) the reasons why he or she could not be afforded substantial redress at the hearing in due course.'

[24] The question of whether a matter is urgent so as to be enrolled and heard as one of urgency is underpinned by the absence of a substantial redress at a hearing in due course. Whether an applicant will not be able to obtain substantial redress at a hearing in due course will be determined by the facts of each case.

[25] On the reading of the present application, the applicants set out the following brief facts as grounds for urgency:

- (a) the conduct of the first and second respondent is illegal;
- (b) the first and second respondents intend to unlawfully remove the second applicant as director of the third respondent;
- (c) if the second applicant is removed as director, the first and second respondents will continue with the unlawful activities to the prejudice of the applicants, third respondent and the creditors of the third respondent;



(d) if the second applicant is not afforded the interim relief, she will be unlawfully removed as a director etc.

[26] The averments that the respondents have acted illegally (or will act illegally) on their own, do not constitute a ground for urgency. Exceptional circumstances must be shown to exist before urgent relief is granted.<sup>1</sup> Such circumstances have not been shown to exist in the present case.

[27] In my opinion, it cannot be argued that the scheduling of the shareholders' meeting rendered the application urgent. Even if the aforesaid meeting takes place and the second applicant is unlawfully removed as a director, substantial relief can still be obtained at a hearing in due course challenging the validity or legality of the removal, together with ancillary relief.

[28] There is nothing in the founding papers that justifies the applicants' matter to be put at the top of the queue and receive priority on the roll. The applicants' application therefore, stands to be removed from the roll for lack of urgency.

[29] As regards the issue of costs, the general rule is that costs follow the result. The general rule must therefore, find application in this matter.

[30] In the result, I make the following order:

1. The applicants' application to have the matter heard as one of urgency is hereby refused and the matter is struck from the roll for lack of urgency.
2. The applicants are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the first, second and third respondents. Such costs to include the costs of one instructing and one instructed counsel.

-----  
B USIKU  
Judge

#### APPEARANCES

---

<sup>1</sup> *Tjipangandjara v Namwater* 2015 (4) NR 1116 para 13.

APPLICANTS: A Ellis (with him S Kahengombe)  
Instructed by Kahengombe Law Chambers, Windhoek

RESPONDENTS: J Jacobs (with him J Vermeulen)  
Instructed by Ellis Shilengudwa Inc., Windhoek